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The County of San Diego Solid Waste Local Enforcement Agency (LEA) has reviewed the draft proposed Permit Implementation Regulations (AB 1497) and is providing the following comments for your consideration.

Comments:

Authority for proposed regulatory changes

Informational meetings for new facility permits

The California Integrated Waste Management Board (CIWMB) has authority to promulgate regulations to implement the Public Resources Code (PRC). Moreover, AB 1497 expressly directed the CIWMB to define the phrase "significant change in the design or operation of the solid waste facility that is not authorized by the existing permit" as used in PRC 44004(a).

However, regulations must implement the applicable statute, and the PRC currently contains no requirement for a public hearing prior to EA approval of an application for a new solid waste facility permit. The statutory requirement for a hearing applies only to significant changes at already-permitted facilities. Similarly, AB 1497 does not direct that this public hearing requirement be extended to new facilities.

We understand that CIWMB staff is implementing the instructions of the CIWMB Board in making this proposal for additional hearings, and we understand that the Office of Administrative Law approved CIWMB Construction & Demolition (C&D) regulations that imposed a similar requirement as an exercise of general CIWMB rulemaking authority. However, we believe that the requirement for public hearings for new permits is a duplication of the Landuse authority public hearing process.

There is clearly a rational basis for the different treatment of new and revised permits that the legislature has directed. A change in design or operation at an existing facility may not require a new CEQA document, because it may not involve new impacts or significant increases in impacts that were not previously analyzed. There may also be no requirement for a new land

use permit, because many older landfill use permits are written so broadly. For these changes, the EA and local authorities may therefore never be subject to a public notification requirement, and may never be exposed to local community comments, unless a notice requirement or a hearing requirement is imposed. This makes a mandated local informational meeting important. In contrast, for a new facility, there will be a CEQA document and related public notice requirements, and there will typically also be a local land use approval process that includes notice and comment procedures.

This draft proposes to mandate more hearings than the law requires, by expanding the scope of these proposed regulations. A desire for consistency with CIWMB regulations for C&D facilities is not an adequate justification to set aside the categorical statutory distinction made in the statute, especially where imposing a non-mandatory requirement would be inconsistent with a rational distinction the legislature made when these PRC provisions were enacted. The CIWMB should take into account that the legislature effectively confirmed that distinction in AB 1497, which revisited this issue area but did not impose a hearing requirement for new facility permits.

CIWMB staff's expectation that most of these hearings can be piggybacked onto land use or CEQA hearings is unlikely to be met in practice. It is important that CEQA hearings and land use hearing not prejudge whether a facility permit will be issued. In contrast, these public information hearings presume that the LEA will forward a proposed permit change to the CIWMB.

AB 1497 did not authorize or direct the CIWMB to develop regulations to require public information hearings for new facility permits. Proposal 2006-34 should therefore be revised to eliminate the new, non-statutory, requirement for a public informational meeting for new facility permits.

Requiring EA notice for "modified" permits and RFI amendments

The proposed regulations impose new notice requirements even where a proposed change at a facility is determined by the EA not to be a "significant" change for purposes of PRC 44004(a). (21660.1) Once that determination is made, however, there is no basis in the PRC or in AB 1497 for imposing a notice requirement on EAs. The requirement for this notice by the EA should be dropped.

If the regulations continue to require that the EA provide some form of notice, the regulations should be amended (or supplemented with policy) so that EAs know what to say about how comments can be submitted. There is currently no provision in the regulations to answer that question; the assumption appears to be that if an EA does not conduct an informational meeting, it will either accept comments in some other way, or will provide notice of a comment opportunity that the CIWMB will provide.

Delegation of CIWMB authority for approval of "modified" permits

The proposed regulations would require approval by the CIWMB Executive Office (EO), rather than by the Board, for a "modified permit" as classified by the EA. PRC 44009 specifically states that "the board shall, in writing, concur or object" to new or modified permits within 60 days. Because the board must act by a roll call vote at a meeting to which the Brown

Act applies, direct Board action always involves public notice and an opportunity to comment prior to Board action.

The CIWMB can delegate its modified permit approval function to the EO (PRC 40430), but the effect of the delegation put in place here will be to eliminate the opportunity that applicants and interested parties now have to present their views on modified permits to the full Board at a public meeting. This reduction in the transparency and accessibility of permitting processes at the CIWMB should be reconsidered, or it should be disclosed and explained forthrightly in the rulemaking package. It has not been very many years since the CIWMB defended its existence as a separate agency by emphasizing the importance of access to a board, rather than to an appointed director, on matters such as this.

Proposed definition of "significant change"

The heart of this proposal, and the only element that is required by AB 1497, is the definition of "significant change" in the phrase "significant change in the design or operation of he solid waste facility that is not authorized by the existing permit" as used in PRC 44004(a).

The proposal takes a fundamentally wrong approach to this task, by equating the significance of a change requiring a permit revision, to whether the EA decides to "include further restrictions, prohibitions, mitigations, conditions or other measures to adequately protect human health, public safety, ensure compliance with State minimum standards or to protect the environment." (21563(b) (6).) This approach flies in the face of decades of CEQA practice state-wide, in which "significant" impacts must be acknowledged and disclosed even where they are not susceptible to mitigation below a level of significance.

The significance of a change or impact should not be equated to or depend upon an ultimate decision that it is feasible to mitigate that change or impact. Particularly for solid waste disposal facilities, a change in a permit may have significant impacts that cannot be effectively mitigated, but which will instead be overridden. It may be appropriate, for example, to increase the allowed daily capacity of a landfill despite traffic impacts that cannot be mitigated, if the added capacity is needed and no better alternatives are available.

Conversely, an EA may impose "restrictions, prohibitions, mitigations, conditions or other measures to adequately protect human health, public safety, ensure compliance with State minimum standards or to protect the environment" in connection with changes that have no significant impact, for any number of reasons. A condition may be essentially a standard recitation to inform the applicant of an existing legal requirement (e.g., comply with state minimum standards). A restriction or condition may be included in a permit in response to a comment, even if the scenario or concern raised in the comment is not really a significant matter, or even if the restriction or condition is never expected to become a binding constraint based on actual operations.

The proposed definition of "significant change" would also undermine an important practical dynamic that now works to secure applicant acceptance of clear and enforceable permit conditions. In general, it is clearly in an applicant's best interests today to prefer CEQA documents and permits in which significant impacts are clearly identified, whether they are then expressly mitigated or only overridden. Identification of impacts makes litigation less likely. The definition of "significant change" that staff has proposed would instead effectively require that every "significant" change be mitigated, and it would also transform every impact for which

mitigation was offered into a significant impact. The inevitable result would be greater reluctance on the part of applicants to agree that mitigation was needed, or to agree that a change or impact was "significant."

A further concern here is that some permit changes may have significant impacts that can and should be mitigated but not by the EA. Mitigation may instead be imposed by an RWQCB or a resource agency in connection with another required permit. Under the proposed definition, these changes would not be identified as significant because the EA would not impose the necessary and feasible mitigation in the EA's permit.

A new definition of "significant change", section 21563 (d)(6), is needed. We suggest the following:

"The EA determines that the change itself would have or could have a significant adverse effect on human health or the environment, that will not be reduced to an insignificant level through compliance with applicable requirements of the Public Resources Code or CIWMB regulations; and the EA has identified additional feasible prohibitions, mitigations, conditions or other measures for consideration as permit requirements to reduce those adverse impacts."

The LEA is opposed to the section 21620 (a)(4)Revised Permit- Alternative 3 Significant Change List for use in determining what is a significant change in a revised permit. This will restrict the discretion of the LEA to reflect the diversity of their jurisdiction and will impact decision making by the LEA.

New mandatory duties for LEAs

In general, the CIWMB should avoid regulations that impose new mandatory duties on LEAs, because every mandatory duty increases the risk the EA will be exposed to litigation seeking damages allegedly caused by an LEA's failure to perform that mandatory duty. Exposure to liability and to the costs of litigation in turn will make existing and potential LEAs less willing to take on or to continue implementing this program.

Proposal 2006-34 would create a new mandatory duty for LEAs to provide notifications to other agencies concerning applications "for tracking purposes." (E.g., 21660.1(b).) If that kind of notice is needed, it should be arranged as an administrative matter; there is no need for a mandatory regulation.

The phrasing of mandatory duties that are retained is also important. For example the current proposal requires the EA to conduct an informational meeting "for all new and revised solid waste facility permit applications." (21660.2.) This opens the door to litigation based on a LEAs failure to conduct an allegedly mandatory meeting, by anyone who wants to dispute the LEA's determination of the significance of a change at a facility. Different wording could be used, that would require the LEA to conduct this meeting only if it determined there was a significant change at issue. The difference is subtle but important.

Unnecessary appeals and litigation

The proposal could be clearer concerning how distinctions between RFI amendments, significant changes requiring a revised permit, and lesser changes requiring only a modified permit, will be made. A key consideration should be to make clear that these determinations

are to be made by the LEA, or if proposed to the LEA by an applicant, can be accepted or rejected by the LEA

At section 21666, the proposal appears to contemplate that applicant will make the initial determination as to whether a proposed change qualifies as an RFI amendment, with the possibility an LEA may pare down the changes that will be approved on that basis. The section should further provide that the LEA may reject an application for an RFI amendment if the LEA concludes that a permit amendment is needed instead.

Section 21666 further provides that an applicant retains a right to appeal. In contrast, at 21665(b) this RFI determination, and the determination as to whether a more significant change should be classified as a "modified" or "revised" permit, are expressly reserved for the LEA, and appeal rights are not expressly addressed.

All LEA determinations concerning the classification of applications for processing purposes are interim decisions that do not finally determine the rights of an applicant, whether a permit will be granted or denied, or how a permit may be conditioned. These regulations should make it clear that these interim, procedural LEA determinations are <u>not</u> subject to appeal.

The LEA recommends that sections 21660.1 (a) (7), 21660.3 (a) (11), and 21660.4 (a) (10) be deleted. Requiring the LEA to provide information on the availability of appeals in the circumstances addressed by those sections would make the determination subject to an appeal. The LEA determines that an application is complete, the classification of a proposed change for processing purposes, and/or the notice that an information hearing will be held should not be subject to appeal. The LEA has not taken an action at this point except to receive the application, classify the change, and notice a meeting. An appeal is premature.

PRC 44300 provides for appeals of permit denials, suspensions and revocations, not for appeals of interim decisions that are a part of the permitting process. These regulations should therefore not refer to or purport to create any right to interim appeals of EA classification decisions. Instead, notice of appeal rights should be provided only when action has been taken to grant and to specifically condition, or to deny, a permit or permit modification. Allowing appeals of intermediate EA determinations would give an applicant and possibly the public, too much leverage over the permitting process.

<u>Denying permits</u>

The proposal does not reflect the possibility that an EA could accept a permit application as complete and correct, but deny a permit. See, e.g., 21650(g) (6).

<u>Sequencing and timing</u>

The proposal requires certain noticing requirements to be met 10 days before an EA "accepts" an application as complete and correct. (See flowchart following 21620; and 21660.1(b).) In other words, deadline dates that cannot be established until a permit application is accepted, must be specified before the permit is accepted. (21660.1(a) (5).) Moreover, for applications that will require an informational meeting, this pre-acceptance notice must include the "EA's preliminary determination pursuant to 21665." (21660.3(a) (6).) That reference is ambiguous, and that requirement is premature.

This is all backwards. The LEA must accept an application as complete and correct, before it can determine whether to issue a permit, or how a permit or permit change may be conditioned. The conditions the EA ultimately determines it will impose, will in turn, under these regulations, determine whether a permit change is a "modification" that does not require an informational meeting or a "revision" that does require a meeting.

Notice requirements should follow, not precede, LEA acceptance of an application. Requiring notice within 10 days of acceptance would be reasonable.

Minor changes list and divesting the LEA of authority

The proposal effectively divests LEAs of authority over "minor" changes to permitted facilities, because these changes can be implemented "without LEA review and approval" if specified criteria are met. The proposal provides no opportunity for the LEA to satisfy itself that those criteria are in fact met before a change is implemented. Instead the applicant will make those decisions, telling the LEA later, and the burden will be on LEAs to detect and to take enforcement action to reverse changes asserted to be "minor" that are not appropriate for the facility without further LEA review.

Divesting LEAs of authority over minor changes unless permits are tightly written will not simplify the permitting and permit amendment process; it will instead put increased pressure on LEAs to write detailed and restrictive permits.

Alternatively, LEAs may attempt to rely on permit boilerplate that prohibits changes in operations at a facility without the prior approval of the LEA. This would be philosophically but not literally inconsistent with these proposed regulations. Many LEA permits statewide already include this type of language. This proposal should expressly ratify this practice, for LEAs that choose to require a prior review of minor changes. Subsequent CIWMB review would still be eliminated.

The LEA is not supportive of the minor change list alternative 1 and 2, as placing lists in regulation does not allow for flexibility and decision making. The minor changes should be discussed in an LEA Advisory for use by the LEA and operator as examples of minor changes. This would allow the LEA to use discretion in accepting such changes with noticing from the operator in a manner similar to section 21620 (a) (1) (E).

Additional Comments

1. Section 21660.2 does not take in to account the reality that applicants extend statutory deadlines for LEA action after permit applications are accepted as complete and correct... Provision should be made for extending the deadline for holding informational meetings in these cases.

2. Staff's assertion in the Notice of Proposed Rulemaking that these regulations will have "no" cost impacts on affected individuals or businesses defies common sense. No support is offered for this statement.

3. In section 21620(a) the reference intended in the first parenthetical is unclear (which term is being defined by reference to what?), and may be inappropriate.

4. The reference in 21660.3(a) (7) to 21665(c) (1) appears to be incorrect.

Thank you for the opportunity to comment on these proposed regulations. If you have any questions or require clarification, please contact me at (858) 694-2629.

Regards,

Original signed

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